From: Mike Hicks
To: Microsoft ATR
Date: 12/8/01 1:07am
Subject: Microsoft Settlement

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CC: attorney.general@state.mn.us@inetgw,mail@mpr.org@i...

Hello,

In accordance with the Tunney Act, I'd like to make some comments regarding the tentative agreement to Microsoft's federal antitrust case that the U.S. Department of Justice, nine States, and Microsoft agreed to in November.

I'm CC'ing the Attorney General of Minnesota as well as some local media outlets, so they can all know what kind of comments people are making regarding this case. For their convenience, I provide the following URL so they can read the agreement for themselves:

http://www.usdoj.gov/atr/cases/f9400/9495.htm

I am currently a student attending the University of Minnesota in Minneapolis, MN. I'm focusing on Computer Science, for which I've done a fair amount of programming in Linux and Solaris, Sun Microsystem's variant of Unix. I also work on campus, supporting Linux and Solaris systems at the Carlson School of Management.

Most of my comments are based around part III., the "Prohibited Conduct" portion of the document. In short, I feel that this is a poor agreement that is quite favorable to Microsoft. The Department of Justice and the nine States should withdraw their consent to the agreement or alter the agreement. Failing that, I believe that the Court should reject the agreement and find other remedies.

First off, I was surprised in a number of cases to see what appear to me to be gaping loopholes that would seem to make the agreement almost entirely ineffectual. I may be misunderstanding the precedence of different portions of legal documents, but the statements are unsettling to say the least.

On the second page, in part III.A., the settlement states "Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM..." I'm unsure what "this provision" means in that statement, but whatever portion of the settlement it covers, it seems to void. It appears that Microsoft could draw up any license agreement they want with any Original Equipment Manufacturer, and have it go into full effect.

The next paragraph starts off, "Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service..." This is coming from a portion of the document (III.A.) that starts off, "Microsoft shall not retaliate against any OEM..." It would seem to be that "Consideration" would be the opposite of retaliation (and, in fact, the definition of "Consideration" at the end of the document seems to reflect this). Microsoft would be, in theory, restricted from retaliating against any OEM. However, they could provide Consideration to any other OEMs. It seems to be basically the same effect, in my view.

Again, in III.F.3., similar wording comes up. "Nothing in this section shall prohibit Microsoft from enforcing any provision of any agreement with any [Independent Software Vendor] or [Independent Hardware Vendor]..." It appears that Microsoft has voided another chunk of the document.

It continues. In III.G., the top of page 5 starts with, "Nothing in this section shall prohibit Microsoft from entering into any...joint venture or...services arrangement..." Forgive me for saying so, but this document seems to be turning into Swiss cheese!

I'm just a layman when it comes to legalese, so I may be misinterpreting. Still, this is only the beginning of what I have to say.

In III.A.2., Microsoft is restricted from retaliating against OEMs

"shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System". That seems pretty nice, but it leaves out the options of selling computers either with no Operating System at all, or with a single non-Microsoft Operating System.

In III.C.2., OEMs are allowed to distribute or promote "Non-Microsoft Middleware by installing and displaying shortcuts...so long as any such shortcuts do not impair the functionality of the user interface." I think it would be appropriate to try to determine what "impair" means, or set up a structure for determining what that means.

Related to the above, III.C.3. mentions that OEMs could set up certain pieces of software to launch automatically, even if similar Microsoft products exist. However, this is under the condition that the software either has "no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product." How is "similar" defined here? Wouldn't having a similar interface potentially lead Microsoft to attack makers of such software, possibly on the grounds that they had infringed on a Microsoft trademark, copyright, or patent?

Another similar portion is in III.H. The section numbering seems screwed up here, so I'll call it paragraph four on page 6. Microsoft is allowed to let Windows start up a Microsoft Middleware Product when the "Non-Microsoft Middleware Product fails to implement a reasonable technical requirement". Microsoft recently used similar logic to prevent a number of high-quality web browsers from accessing web pages on their MSN network. Microsoft may have had some legitimate reasons for doing so, but there were some documented cases where Microsoft restricted browsers that fully met Microsoft's technology requirements. Letting Microsoft define what this means would be a really bad idea, in my opinion.

There are some portions of the settlement relating to releasing documentation for communication protocols and programming interfaces for Microsoft Operating Systems and their related products. III.D. requires Microsoft to release documentation within 12 months for Windows XP. New documentation will appear for each "new major version" of the Windows Operating System. I would note that the traditional method for specifying a new major version is to increment the number to the left when the version looks like "X.Y". For instace, going from 1.0 to 2.0 or 3.9 to 4.0 would constitute a new "major version". There is no need for Microsoft to do this when they release new Operating Systems. Microsoft Windows 2000 was also known as Windows NT 5.0. At a somewhat low level, Windows XP is also known as Windows NT 5.1. If this practice continues, Microsoft could theoretically keep going up to version 5.999 if they wanted to, and not release any new documentation.

Additionally, I'm concerned about the restrictions Microsoft might place on the use of documentation for their programming interfaces and communication protocols. It appears that Microsoft may only release information through their Microsoft Developer Network (MSDN). What if Microsoft requires people to pay to be part of MSDN? This could prevent developers of Open Source software from building interoperable products. Additionally, licensing terms could be put together that would prevent people from using the documentation in a non-commercial product.

III.J.2. indicates to me that Microsoft does not want to release any information to non-commercial developers. It states that Microsoft can request in a license that the licensee "has a reasonable business need for the API..." and that the licensee "agrees to submit, at its own expense, any computer program using such APIs...to third-party verification, approved by Microsoft..." Certainly, an open source developer would be unhappy to shell out large amounts of money to verify to Microsoft that their software works. Additionally, even many businesses may balk at this idea. I'd wonder what sort of expense would be imposed upon licensees.

In the same area of the settlement, III.J.1. and III.J.2. state that Microsoft does not have to release documentation for security-related portions of programming interfaces and communication protocols. This would restrict non-Microsoft software from being fully compatible with Microsoft software, potentially causing the software to not function at all.

I have never seen any documentation for Microsoft's APIs or communiction protocols, but I have heard from many people that such documentation is often poorly written or just outright wrong. If Microsoft intends to continue such poor documentation practices, any concessions they make in this settlement will likely have only a small effect on people who wish to make software products that are compatible with what Microsoft distributes.

I find it strange that one of the last lines of the settlement, in VI.U., is this: "The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." I recall that one of the big questions in this case revolved around what portions of software code could be considered to be part of the operating system. This seems like a strange statement to make, and I would worry that it could cause another protracted court case like this to come up in a few years.

I'm done dissecting the settlement, so now for some more general comments. It would seem to me that the point of this settlement is to prevent Microsoft from repeating past aggression against various vendors in the computer industry. One of the mightiest tools that Microsoft has in its toolchest is the Dollar. It is widely understood that Microsoft has vast reservoirs of cash, and they know how to use it to quickly acquire, in part or in full, other companies that have competing or potentially useful technology.

In my view, Microsoft does not practice innovation, they practice 'buynnovation'. So many companies have been assimilated into the company that I doubt anyone has an accurate count. I feel it would be a good idea to reduce Microsoft's ability to acquire new technology in this manner. One possibility would be to impose a monetary penalty on Microsoft. I would certainly hope that flushing the company's bank accounts would change the way it does business. I'm sure there are other ways to slow Microsoft's acquisition of technology.

Microsoft is starting to work its way into many areas that are connected to the software Microsoft makes, but are not software ventures themselves. The Xbox gaming console is one of many examples. It seems that Microsoft would like consumers to live their entire lives in a Microsoft-dominated world, using a Microsoft-approved Internet Service Provider and viewing Microsoft-generated content. This concerns me greatly, and I would love to see something that forced Microsoft to be just a software company again.

Almost at the expense of anything else, Microsoft seems to hold its intellectual property most closely. It recently came out that Microsoft is attempting to stall the European Union investigations into its activities by saying that much of the requested information is covered under intellectual property rights. Within its new .NET strategy, Microsoft has patented a lot of stuff. These patents could come back to haunt the parties in this case, and there are many references to intellectual property in the settlement. If Microsoft desires so greatly to hide behind the shield of patents, I feel they must have an ace up their sleeves. I feel the Court should nullify some of the rights Microsoft has by voiding patents held by the company, at least in certain areas.

I've finally come to the end. I thank the Department of Justice for accepting my comments, and hope the parties involved in this case can come up with a better agreement that addresses the concerns I have.

Sincerely,

Michael Hicks

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